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No. 74-407

In the Supreme Court of the United States

OCTOBER TERM, 1974

ERNEST INFELICE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER INFELICE'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO HIS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JULIUS LUCIUS ECHELES
35 E. Wacker Drive
Chicago, Illinois
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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Prefatory Statement

Petitioner, Ernest Infelice, files this, his Reply to the Brief for the United States, pursuant to Rule 24(4).

For the most part, petitioner relies upon his Petition for Certiorari heretofore filed. However, in view of the position taken by the United States, petitioner deems it necessary to clarify his position to this Court, and to note that certain representations as to purported factual matters as contained in the government's "Statement" (Br. in Opp. pp. 2-4) do not correctly portray the facts as developed by the evidence at trial.

Clarification of Statement of Facts

Petitioner takes issue with the following purported "facts" as set forth in the government's Brief in Opposition (pp. 2-4) and calls to the Court's attention the following explanatory or contradictory evidence:

(1) "Infelice . . . instructed him [Burks] not to give up his money until he had 'the dope in the palm of [his] hand'." (Br. in Opp. pp. 3-4) While Burks testified to this effect (Tr. 426), *the transcript* of the Kel-set recording that had been made of this conversation *did not contain the word "dope"*. (Tr. 428)

(2) ". . . Infelice told Burks that his package would arrive soon . . ." (Br. in Opp. p. 4) While Burks so testified, nothing of this nature appeared on any Kel-set recording.

(3) ". . . Infelice told Burks that Garelli had gone to New York to 'cop' some heroin, and that he, Infelice, had just returned from a similar mission in Florida." (Br. in Opp. p. 4) While Burks testified that Infelice had used the phrase "to cop," he did *not* testify that Infelice said, "to cop some heroin;" rather, *Burks himself* explained that "to cop" meant to purchase narcotics. (See opinion of Court of Appeals, at p. App. 4 of Petition for Certiorari.) Moreover, although Agent James testified that segments of this alleged conversation were monitored with a Kel-set, nothing of that nature appeared on any transcripts; the Kel-set allegedly "malfunctioned." (Tr. 1159)

(4) ". . . Infelice told him [Burks], 'You know we wouldn't do you like that, we wouldn't give you no bad stuff'." (Br. in Opp. p. 4) However, the Kel-set with which Agent James was supposed to be monitoring this conversation had not been activated, and James' purported corroboration thereof was disbelieved by the trial

court ("it does tax my credulity" A. 19); moreover, such statement does not appear on James' 3500 material. (See Summary of Facts, pp. App. 18-19 of Petition for Certiorari.)

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Petitioner further calls to the Court's attention that Burks' initial meeting with petitioner at petitioner's place of employment was happenstance, rather than planned (Tr. 401), and that each subsequent encounter between them resulted when Burks sought petitioner out at his place of employment; Burks was always asking petitioner to help him find a job, and on at least one occasion the two had an extended conversation unrelated to any criminality concerning a mutual acquaintance. (See pp. App. 16-17 of Petition for Certiorari)

Reply to Government's Argument

1. Petitioner relies on the argument in his petition concerning the invalidity of the schedules of controlled substances (Pet. pp. 24-31), except to note as follows:

The government relies upon a republication which purportedly took place on April 27, 1972 to counter petitioner's alternative argument attacking his conviction upon count 4. (Br. in Opp. p. 5, fn. 4) However, it has not answered petitioner's contention (Pet. pp. 28-30) that such republication cannot constitutionally be applied to conduct on April 27, 1972 (the date of the substantive offense alleged in count 4) since republication *actually* took place on May 12, 1974, although purportedly nunc pro tunc April 27, 1974. (37 Fed. Reg. 9545)

Moreover, the government has not even attempted to answer petitioner's contention that republication was invalid because promulgated by the wrong person. (Pet. pp. 30-31)

2. Regarding his argument that the trial court improperly disregarded impeaching material in and omissions from the tape recordings, and that consequently the evidence against him was insufficient, petitioner substantially relies on the argument in his Petition (pp. 8-17), except to note that the government has seen fit only to rely upon the opinion of the Court of Appeals rejecting this contention. (Br. in Opp. pp. 6-7) No attempt has been made independently to justify the trial court's utter disregard of the impeachment value of the tapes and its reliance instead upon uncorroborated testimony of Burks (in that the only incriminatory words Burks claims petitioner uttered were not on any tapes or transcripts).

Moreover, the government is silent as to the importance and necessity of this Court's formulation of standards for the guidance of trial courts faced with similar situations involving contradictions between the in-court testimony of an informant and tapes of the meetings allegedly described in such testimony.

3. As to the denial of petitioner's motions for polygraph testing constituting an abuse of the trial court's discretion in the peculiar facts of this case, petitioner substantially relies on the argument in his Petition. (pp. 18-24)

The government's argument on this issue (Br. in Opp. p. 7) merely restates a proposition which petitioner concedes, that is, that whether or not to allow such a motion is within the trial court's discretion. But neither the government nor the Court of Appeals saw fit to apply the standard of judicial discretion to the peculiar facts of the case at bar; each wishes to justify the court's ruling solely by virtue of the existence of such discretion. Petitioner wishes to stress that only because of the peculiar factual

setting herein does he contend that denial of his motion for polygraph testing below constituted an abuse of discretion. Petitioner urges this Court to set forth some guidelines for trial courts confronted with situations where, as here, there is a direct conflict between the testimony of an informant and that of a defendant, and tapes exist which contradict and, impeach the informant's in-court testimony.

Conclusion

For any or all of the reasons as set forth in his Petition, as amplified by this Reply, each of which constitutes an extremely important issue which has not been, but should be, decided by this Court, certiorari should be allowed to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner